Supreme Court, U.S.
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No. 82-934

IN THE

Supreme Court of the United States

October Term, 1982

BASIC/FOUR CORPORATION,
Petitioner,

against

CENTRAL MICROFILM SERVICE CORP.,
Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The basic fallacy in CMS' brief is its refusal to recognize that the new trial order at issue here is founded on the District Court's discretionary evaluation of the evidence presented at trial. *E.g., Simpson* v. *Skelly Oil Co.*, 371 F.2d 563, 570 (8th Cir. 1967) ("In ruling on a motion for

1. The only issue involved herein is the use of mandamus to review a new trial order. We therefore do not respond to most of the voluminous (and erroneous or incomplete) references in CMS' brief to issues and evidence irrelevant to that issue.

new trial, the trial court should exercise its independent judgment after a weighing of all the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice"); 6A *Moore's Federal Practice* ¶ 59.08[5] (2d ed. 1982).

The District Court expressly stated that its decision was, pursuant to this standard, based on its evaluation of the "credible evidence" (Pet. p. 8 n.4).[2] To avoid the obvious conclusion that mandamus is unavailable to review such a discretionary finding, CMS misstates that the District Court held "*as a matter of law* that all CMS's computed software losses . . . are not recoverable" (CMS Br. p. 3; emphasis added). Such characterization is refuted both by the District Court's opinion and by CMS' repeated concession that the new trial order was based upon "findings of fact" (CMS Br. pp. 2, 3, 9, 11, 12 n.9, 13). Such findings of fact may not be reviewed by way of mandamus. See Pet. pp. 8-9.

Nor should CMS, by asserting that the District Court's findings of fact were without evidentiary support, be able to "back-door" this Court's approval of employment of mandamus to review the trial record. Such a ruling "would 'run the real risk of defeating the very policies sought to be furthered by' " the Final Judgment Rule [*Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980)], by opening the floodgates to burdening appellate courts with exactly the

2. All abbreviations used in the Petition for a Writ of Certiorari will be used herein. In addition, the petition will be referred to as "Pet." and CMS' opposing brief as "CMS Br." All transcript and exhibit references are to the second trial.

type of full scale review that this Court and Congress have mandated must await final judgments.[3]

Significantly, CMS fails to cite any case in which mandamus was used to review a new trial order based on the district court's discretionary evaluation of the evidence on which the jury verdict was based: neither *Grace Lines Inc.* v. *Motley*, 439 F.2d 1028 (2d Cir. 1971) nor *In re United States*, 565 F.2d 173 (1st Cir. 1977) (CMS Br. pp. 15-17), supports CMS' position;[4] nor has further research uncov-

3. In fact, CMS mischaracterizes the record by asserting the absence of evidence to support the District Court's findings of fact (CMS Br. pp. 3, 17). The record in fact conclusively *refutes* CMS' argument that its substantial investment of time and effort in software services was required by the dealership agreement (the "Agreement") and made at B/4's request (*id.* pp. 9-12, 17). Rather, the evidence established that CMS had total discretion to contract with independent vendors or to find other alternatives for such services, instead of expending its own resources for that purpose. The very exhibits upon which CMS relies support this conclusion: the B/4-prepared summary of the dealership program (Ex. 163, CMS Br. pp. 9-10, A27-A30), received by CMS during the pre-Agreement negotiations, clearly announces that "[t]he dealer will provide [software] *by whatever means he feels necessary*" (A29; emphasis added); Exhibit 8 (CMS Br. pp. 10, A31-A34) contains B/4's recommendation that CMS turn to "outside software vendor master agreements" as "an alternative to increased [in-house] staffing" (A32); and B/4, in Exhibit 15-A (CMS Br. pp. 10-11, A34-A37), reminded CMS of the alternative of "contracts with outside software firms" (A36). Further, (a) CMS admitted it was aware, even before signing the Agreement, that it could satisfy its contractual obligation to provide software by arranging with independent software vendors to perform programming work for end-users (Tr. 430); (b) that software was available to CMS from sources other than in-house development was undisputed (Tr. 138-41, 432, 443-44, 1174-75, 1234; Exs. AT, CB); and (c) beginning as early as December 22, 1975, B/4 consistently urged CMS to utilize third party software vendors (*e.g.*, Tr. 105, 431-34; Ex. AT).

4. *In re United States*, a criminal case, involved the district court's application of an improper legal standard to grant a new trial on the basis of a *post*-trial proceeding; *Grace Lines* concerned the

(footnote continued on next page)

ered any such case. Indeed, in *General Motors Corp.* v. *Lord*, 488 F.2d 1096 (8th Cir. 1973), cited by CMS (CMS Br. p. 16), involving the legal issue of admissibility of evidence and, indirectly, a partial review of the record—not even the full scale review CMS advocates here—mandamus was held inappropriate to review the new trial order. 488 F.2d at 1100. As the court there stated:

> "This evidentiary question, which was the essential question addressed by the trial court, is no different than any other evidentiary issue trial judges decide in the course of granting motions for new trial. To grant extraordinary relief here would be to abrogate the final judgment rule, and allow any litigant, who is forced to retrial on an evidentiary question, immediate review simply by styling his action a petition for writ of mandamus instead of appeal." *Ibid.*

This holding applies equally to the evidentiary issue on which the instant new trial order was granted.

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proper treatment of a juror's remark at the time of rendering the verdict. CMS' reliance on *Grace Lines* indicates the absence of viable authority for its position: that case has been effectively repudiated by the Second Circuit itself [*United States* v. *DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972)], and otherwise generally rejected [*General Motors Corp.* v. *Lord*, 488 F.2d 1096, 1100 n.2 (8th Cir. 1973); Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv.L.Rev. 595, 597 n.9, 608 n.62 (1973)].

Conclusion

B/4's petition for a writ of certiorari should be granted.

Dated: January 12, 1983

Respectfully submitted,

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